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No. 09-164

Supreme Court, U.S.
FILED

In The
Supreme Court of the United States

GARY ALLAN RICHMOND, as Personal Representative for the Estate of Kyle Dalton Richmond,

Petitioner,

v.

PEACEHEALTH MEDICAL GROUP, a Washington corporation doing business in Oregon,

Respondent,

and

EUGENE EMERGENCY PHYSICIANS, P.C.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Oregon

PETITIONER'S REPLY TO PEACEHEALTH'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

PETITIONER'S REPLY 1

Jurisdiction is established 1

Respondent incorrectly asserts that the facts of this case fall squarely within the Oregon rules of civil procedure 6

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985) 3

Hathorn v. Lavorn, 457 U.S. 255, 102 S.Ct. 2421 (1982) 3

Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469 (1983) 3

State v. Miller, 327 Or. 622, 635 n.10, 969 P.2d 1006 (1998) 1, 3

Street v. New York, 394 U.S. 576, 89 S.Ct. 1354 (1969) 2

Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889 (1981) 1, 2

PETITIONER'S REPLY

Jurisdiction is established

The Oregon constitution has no due process clause. Any procedural or fairness challenge in an Oregon court is automatically made under the due process clause of the 14th Amendment. *State v. Miller*, 327 Or. 622, 635 n.10, 969 P.2d 1006 (1998) (Oregon's constitution has no due process clause). Despite that there is nothing in the record to indicate whether the state court decided this case on adequate and independent state grounds or on the federal due process question raised by Petitioner, the Oregon court of appeals could only have decided the due process assignment of error on federal grounds.

Respondent has erroneously cited *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L. Ed. 2d 392 (1981) in proposing that because the Oregon courts neither considered nor passed upon Petitioner's claim for failure of due process, federal jurisdiction was not raised. *Id.* On the contrary, this Court held in *Webb*, *supra*, that the jurisdiction of this Court to review the final judgment of a state court can arise only "if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Id.* at 497, 101 S.Ct. at 1892. In this case, the record indicates that an exception was preserved at the trial court and the federal question was pressed and passed upon in the state court of appeals in Petitioner's Appeal to the Oregon Court of Appeals on page 10, paragraph 6 as

part of Petitioner's First Assignment of Error. There Petitioner wrote, "It is inherently unfair for the trial court to twice affirm an instruction and then refuse to give it after all testimony is heard." Petitioner then went on to explain:

> "Finally there is an issue of fundament fairness. Plaintiff was told the trial court would give the requested instruction on two separate occasions during defendant's case-in-chief. Believing it would be, plaintiff's counsel based his objections to questions of defense witnesses and cross examination on the promised instruction. The trial court reversing itself and refusing to instruct on *Cole*; after all testimony had been given blindsided the plaintiff and denied him his due process rights to a fair hearing."

Respondent is correct that this Court may presume that where the highest state court fails to pass upon a federal question the omission is due to want of proper presentation in the state court, unless the aggrieved party can affirmatively show otherwise. *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L. Ed. 2d 572 (1969). Here, Petitioner has met his burden. There can be no dispute that Petitioner properly raised the federal due process claim before the state court of appeals under state court rules. The state court had a fair opportunity to address the federal question that is sought to be presented here. *Webb. v. Webb*, 451 U.S. 493, 501, 101 S.Ct. 1889, 1894, 68 L. Ed. 2d 392 (1981).

Most significant, there is no adequate and independent state ground upon which a procedural due process claim could have been decided by the Oregon court of appeals. This Court cannot presume that the court of appeals passed upon a federal question due to want of proper presentation because Oregon lacks a due process clause in its state constitution and relies on the federal due process clause under the 14th Amendment. Any fairness or procedural challenge in an Oregon court is automatically a challenge under the federal due process clause. *See State v. Miller*, 327 Or. 622, 635 n.10, 969 P.2d 1006, 1013 n.10 (1998) (defendant's assertion that the trial court denied him "due process of law" raises no issue of state constitutional law because the Oregon Constitution contains no due process clause. Rather, that claim asserts only those issues that arise under the Due Process Clause of the Fourteenth Amendment to the United States Constitution); *Hathorn v. Lavorn*, 457 U.S. 255, 262-265, 102 S.Ct. 2421, 2426-2428, 72 L. Ed. 2d 824 (1982) (state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment); *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469 (1983) (when state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when adequacy and independence of any possible state-law ground is not clear from face of opinion, Supreme Court will accept as most reasonable explanation that state court decided case the way it did because it believed that federal law required it to do so);

Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985) (Supreme Court will not assume that state court decision rests on adequate and independent state grounds when state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when adequacy and independence of any possible state-law ground is not clear from face of opinion).

In this case, the claimed violation was that a critical jury instruction had been promised twice during the trial: That if Plaintiff overcame the burden of demonstrating that Defendant knew or should have known that the decedent was mentally ill and at risk for suicide, then the jury may not conclude the decedent was at fault or responsible for actions as a result of the very mental illness that Defendant had a duty to protect against ("*Cole* instruction"); specifically, that the decedent could not be found legally at fault for his own suicide. This instruction was promised twice during the trial and once during a motion in limine. When at one point testimony was elicited from a Defense witness stating that it could not be Defendant's fault because the decedent killed himself, the court promised to give the *Cole* instruction as a corrective instruction.[1] However, at the end

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[1] MR. BARTON: Your Honor, I think there is a lingering innuendo all the way through this record, in the transcript, some fashion that there are thirty thousand suicides a year, and you can't stop it.

(Continued on following page)

of the trial, the *Cole* instruction was withdrawn despite the trial court's agreement that it was a correct statement of the law even as it was withdrawn.[2] Furthermore, Plaintiff's exception made clear the *Cole* instruction had been requested throughout the trial because the evidence presented by the Defendant was confusing and misleading.

> "And respectfully, I think, given the texture of the case, the way it's been defended, the arguments, the subliminal messages, that that is on the table, to try to in some fashion, blame Kyle Richmond, as if no one knew and this snuck up on everybody, and therefore there's a level of culpability. And *Cole vs. Multnomah County* addresses that and says that the very shortcomings of mental health and nature of the deceased cannot be used

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THE COURT: Well, I think even with this last witness, that the testimony you elicited on causation, Mr. DeFreest, requires me to give that instruction based upon the testimony of your own witnesses. Next? (Tr. 618:1-10)

[2] THE COURT: So that a jury can understand it, I think it would be very difficult to modify. I mean, if somebody starts arguing the idea of contributory negligence of Kyle Richmond, I'm going to sustain an objection, because I think that's consistent with the *Cole* case. I mean, I don't think that you can argue that Kyle was negligent, but it certainly could be argued that – well, the court goes on in the *Cole* case, which I find interesting, "If plaintiff was not mentally ill or if corrections officials were reasonably unaware of any illness, then defendants prevail because they were not negligent, not because plaintiff was contributorily negligent." And I think that the defendant in this case and Mr. DeFreest are entitled to argue sole cause. (Tr. 875:22-876:11)

> against him. Now, you can argue causation all you want, but not implicit arguments of culpability or fault. And I feel that's what's been done, and it should have been given, and that's my only exception, your Honor." (Tr. 1013:20-1014:7)

As noted earlier, the trial court agreed twice during the trial with this same argument and promised to give the requested instruction. There is no doubt that the exception by Plaintiff to the trial court's ultimate refusal to give the instruction was grounded in the procedural fairness of omitting the critical jury instruction once it had been promised. There can also be no doubt that the Plaintiff gave the trial court a sufficient explanation of the substance of the objection for the court to consider the issue of fundamental fairness.

Respondent incorrectly asserts that the facts of this case fall squarely within the Oregon rules of civil procedure

It is immaterial that the trial court informed the parties prior to argument of the jury instructions it intended to give as required by the Oregon Rules of Civil Procedure, ORCP 59A.

The issue is whether the *Cole* instruction should have been given as promised during the trial. By failing to give the instruction, the trial court created an unreasonable, unnecessary and significant risk, which the trial court is obligated to protect against,

that the jury could infer the decedent could be legally at fault for his own death. While Respondent is correct that the decedent was not a party to the case, that fact is of little consequence if jurors are permitted to conclude from objectionable testimony that if decedent is at fault, the Defendant cannot therefore be at fault. The special *Cole* instruction protected against this risk. Petitioner's case centered on the instruction being given and the trial court indicated throughout that it would be given for the very reasons set forth above.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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